



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF I-I- INC.

DATE: JAN. 25, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an IT consulting services company, seeks to employ the Beneficiary as a senior software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage to the Beneficiary.

On appeal the Petitioner submits additional documentation in the form of its federal income tax return for 2017 and asserts that the evidence of record establishes its ability to pay the Beneficiary’s proffered wage.

Upon *de novo* review, we will withdraw the Director’s decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the

regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date¹ of the petition onward. The priority date in this case is March 6, 2017. The labor certification states that the wage offered for the job of senior software engineer is \$108,264 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case, the record includes a copy of the Form W-2, Wage and Tax Statement, the Petitioner issued to the Beneficiary for 2017, showing that the Beneficiary received "wages, tips, other compensation" totaling \$85,842.21 that year. This amount was more than \$22,000 below the proffered wage. Therefore, the Petitioner has not established its ability to pay the Beneficiary's proffered wage from the priority date of March 6, 2017, onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. On appeal, the Petitioner has submitted a copy of its federal income tax return (Form 1120S) for 2017, which recorded net income of \$94,318 and net current assets of

¹ The "priority date" of a petition is the date the underlying labor certification application is filed with the DOL. See 8 C.F.R. § 204.5(d). The petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

\$7,670. Thus, the Petitioner's net income of \$94,318 plus the wages it paid to the Beneficiary in 2017, amounting to \$84,842.41, exceeded the proffered wage.

However, when a petitioner has filed other Form I-140 petitions, it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). USCIS records indicate that the Petitioner has filed at least 13 other Form I-140 petitions since July 2017. Accordingly, the Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and every other I-140 beneficiary from this petition's priority date of March 6, 2017, until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).²

There is no evidence in the record concerning the Petitioner's other I-140 beneficiaries, and the Director has not previously requested any such evidence. Accordingly, we will remand this case to the Director for the purpose of requesting additional evidence from the Petitioner and, based on its response thereto, determining whether the Petitioner can establish its continuing ability to pay not only the Beneficiary's proffered wage, but the proffered wages of its other I-140 beneficiaries as well from the priority date of March 6, 2017, onward.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wages of all its I-140 beneficiaries.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of I-I- Inc.* ID# 2667755 (AAO Jan. 25, 2019)

² The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.